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September 16, 2016

Michael E. Gans, Esquire
Clerk, United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street, Room 24.329
St. Louis, MO 63102

Re: MikLin Enterprises, Inc. d/b/a Jimmy John's v. NLRB, Case Nos. 14-3099 & 14-3211

Dear Mr. Gans:

This letter is MikLin Enterprises, Inc.'s response to the NLRB's Rule 28(j) letter of this date which appeared in my inbox at 4:44 PM today, September 16, 2016 prior to the oral arguments scheduled for 2:00 PM Monday, September 19. The Board's letter concerns, and was accompanied by, today's 67-page decision of the U.S. Court of Appeals for the District of Columbia Circuit enforcing the agency's Order in MasTec Advanced Technologies, 357 NLRB 103 (2011). The Board had held that employees' communications in a television broadcast were protected under the NLRA.

The D.C. Circuit decision changes nothing with respect to the MikLin's position in the instant case. MikLin extensively has argued the key issues in its Opening Brief and Response and Reply Briefs. With the oral argument scheduled for Monday, it is inappropriate to restate in detail all the arguments briefed. Accordingly, MikLin will merely highlight two principal ways in which *Direct TV* is distinguishable.

THE FACTS: Primary Purpose; "Main Thrust." The Board, and now the Circuit Court, held that a principal reason the MasTec employees' conduct was protected was because it was "primarily aimed to draw the public's support in the dispute" rather than "intended to ... gratuitously caus[e] harm to the company." *DirecTV, Inc. v. NLRB*, No. 11-1273 (D.C. Cir. Sept. 16, 2016) at 27.

The instant case is distinguishable on this point from *Direct TV*. MikLin argues there is a vast quantum of evidence that the "main thrust" and "primary purpose" of the overall message to the public was "clearly designed to hit the employer where it would hurt, by interfering with its business relations with its customers." See, e.g., *Red Top, Inc.*, 455 F.2d 721, 727 (8th Cir. 1972). One really need look no further than the eye-catching design and layout of the posters to discern this. The side-by-side photographs of the "healthy" and contaminated sandwiches, along

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with the question, "Can't tell the difference?" with the frightening reference to customers' immune systems, evidences a disloyal attack, "separable" from the labor dispute, and is therefore unprotected under the principles articulated in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 477 (1953). MikLin will expand on this point in the oral argument.

THE LAW: The Applicable Standard for Unprotected Falsehoods. In determining whether the MasTec employees' conduct was unprotected disloyalty, the D.C. Circuit determined that the statements were "maliciously untrue." This standard has its focus on the state of mind of the declarant or author. The standard in this Circuit is whether statements are "materially false and misleading." *St. Luke's Episcopal-Presbyterian Hospitals, Inc. v. NLRB*, 268 F.3d 575, (8th Cir. 2001). The Eighth Circuit expressly rejected the "maliciously untrue" standard, and the *St. Luke's* test is not merely a lower standard of untruthfulness. It is qualitatively different in that the use of the word "misleading" is a mandate to take into account what a reasonable *listener* or *reader* would *understand* the message to be.

Sincerely,



Michael A. Landrum

Attorney for MikLin Enterprises, Inc.

Cc: All Counsel (via CM/ECF)